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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1936

No. 505.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,

Petitioner,

vs.

WILLIAM W. SCARLETT,

Respondent.

ANSWER TO RESPONDENT'S PETITION FOR A REHEARING.

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To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

With all claims of common-law negligence voluntarily eliminated from the case by respondent and abandoned by him at the trial, his petition for rehearing is without substance, support or justification of any kind whatever.

The petition for rehearing and citation of authorities in support thereof merely repeat the matters and things heretofore pressed upon the attention of this Honorable Court by respondent and his counsel.

Counsels' seemingly intemperate language might be excused or put out of view if they could only remain con-

sistent. They now say, "Whether or not either the ladder or the rod * * * was defective is beside the question. No such issue was before this Court * * * whether or not the ladder was defective was entirely immaterial." (Petition for rehearing, pp. 2 and 3.) In the brief for respondent, at page 7, counsel speak of "unregulated defects", and on page 18 of "a failure of the Interstate Commerce Commission to make a rule or regulation concerning every defective condition," etc., and on page 20 counsel say "that the Interstate Commerce Commission, in fact, made no rule or regulation covering the defect in the ladder in this case, is not difficult to demonstrate." In these instances counsel seemed to think that it was decidedly material whether the ladder was defective.

The Supreme Court of California was of the same opinion; that Court said "he (respondent) does not claim to have been injured by a defective device other than the ladder, i. e., a defective brace rod" [R. p. 220]. This, respondent quotes on page 25 of his brief.

At any rate, it is only a play on words for counsel to contend that a ladder may not be defective and still be insecure.

Counsel now say "whether or not the brace rod was a part of the ladder, as such, is beside the question" (petition for rehearing, p. 3), counsel again shifting their position. In their brief for respondent counsel said "the diagonal brace rod was part of the ladder" (p. 6); and further said, "the diagonal brace rod as installed became a part of the ladder in its use" (brief for respondent, p. 23]; and also said, "no better argument, that the brace rod became a part of the ladder, can be urged than the reasoning of the Supreme Court of the State of California on

this subject, which we quote as follows: * * *" (brief for respondent, p. 23).

Counsel have misapprehended the holding of the Court in *Texas etc. v. Rigsby*, 241 U. S. 35, referred to by them on page 2 of the petition for rehearing; and in the case of *Davis v. Reynolds*, 280 Fed. 362, also cited on the same page, counsel have failed to state that the defect claimed in that case was in the "sill step" itself, "allowing the sill step on the engine to become slick from use," and not in some other appliances having an independent use; counsel also forget that the Boiler Inspection Act was involved in the *Davis* case.

Counsel contend that this Court has either overruled *Great Western v. Donaldson*, 246 U. S. 121, or announced a ruling contrary to the holding therein. We do not agree with this contention. If we correctly understand the *Donaldson* case the Court there held that there was "nothing in the Boiler Inspection Act to warrant the conclusion that there is no liability for an unsafe locomotive, in view of the provisions of Section 2 of the act, because some particular feature of construction, which has been found unsafe, has not been disapproved by the Federal boiler inspector." That is vastly different from the holding in the case of *Pennell v. Philadelphia & R. R. Co.*, 231 U. S. 675, where the Court said "that custom, having the acquiescence of the Interstate Commerce Commission, is persuasive of the meaning of the statute."

Counsel, on page 5 of their petition for rehearing, take this Court to task for saying that the round type of brace rod involved here was adopted in 1924. The Court has the record for this conclusion. The witness Fred A. Isaacson testified: "We broke away from an old practice

some time in 1924 and applied to our cars a round inch and one-eighth diagonal brace." [R. p. 37.] Furthermore, it was conceded by counsel in oral argument that various types of brace rods, consisting of flat braces, wooden braces, and angle iron braces, all occupying substantially the same relative position with reference to the side-ladder, were in use at the time of and prior to the adoption of the Safety Appliance Standards Order of March 13, 1911. These were all of the same general type and for the same purpose as the brace rod involved in this controversy.

Counsels' reference to testimony of the witnesses John F. Struby, Clarence Craig and Theodore Shafer was unfortunate from their standpoint. (Petition for rehearing, p. 6.) None of these witnesses ever heard of an accident resulting from this brace rod and, although familiar with the rule that "every employee should report promptly to his foreman or some member of the safety committee or other proper person all unsafe conditions or practices," not one of said witnesses ever reported such a brace rod as constituting an unsafe condition or practice. [See R. pp. 125, 126 and 127.]

We respectfully submit that the Court reached the only possible conclusion under the facts and the law and that, therefore, a rehearing should be denied.

Dated: Los Angeles, California, April 19, 1937.

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